APPEAL NO. 1203-0230-AC
Q.B. NO. 1103 14112

IN THE COURT OF APPEAL OF ALBERTA

IN THE MATTER OF THE TRUSTEE ACT, R.S.A 2000,C. T-8, AS AMENDED

IN THE MATTER OF THE SAWRIDGE BAND INTER VIVOS SETTLEMENT CREATED BY CHIEF WALTER PATRICK TWINN, OF THE SAWRIDGE INDIAN BAND, NO. 19, now known as SAWRIDGE FIRST NATION, ON APRIL 15, 1985 (the "1985" Sawridge Trust")

Between:

ROLAND TWINN, CATHERINE TWINN, WALTER FELIX TWIN, BERTHA L'HIRONDELLE, and CLARA MIDBO, as Trustees for the 1985 Sawridge Trust

APPELLANTS
(Respondents)

-AND-

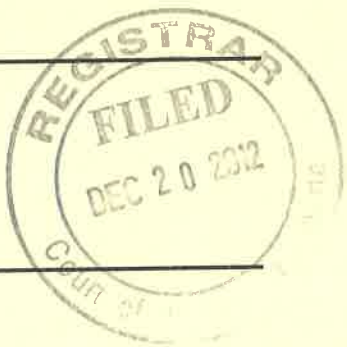
PUBLIC TRUSTEE OF ALBERTA

RESPONDENT
(Applicant)

-AND-

SAWRIDGE FIRST NATION, MINISTER OF INDIAN AFFAIRS AND NORTHERN DEVELOPMENT, ALINE ELIZABETH HUZAR, JUNE MARTHA KOLOSKY and MAURICE STONEY

INTERESTED PARTIES
(Interested Parties)



Appeal from the Order of
The Honourable Justice D.R. Thomas
Dated the 12th day of June, 2012
Filed the 20th day of September, 2012

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I. STATEMENT OF FACTS

The Issues

1. This appeal raises the issue of whether the strict criteria for an award of advance costs, as set out by the Supreme Court of Canada, apply in the context of proceedings relating to the administration of a trust.

2. The Chambers Judge concluded that the criteria did not apply, and that the Respondent, the Public Trustee of Alberta, was entitled to advance costs on a solicitor and his own client basis, to be paid out of the trust assets. The Chambers Judge also concluded that the Respondent was also exempted from liability to pay costs of the other parties to the proceedings.

3. The Chambers Judge incorrectly likened the trust at issue to a receivership in which the Court has control over the assets, and likened the Public Trustee to a receiver.

4. The Chambers Judge also awarded costs of the application to the Respondent on a solicitor and his own client basis, without argument and without reasons.

The Parties

5. The Appellants are the trustees of the Sawridge Band Inter Vivos Settlement dated April 15, 1985 (the "1985 Trust").

6. The Respondent is the Public Trustee of Alberta. Pursuant to the Order under appeal, the Respondent has been appointed litigation representative for a number of minor beneficiaries and potential minor beneficiaries of the 1985 Trust.

7. The "Interested Parties" are:

   a. The Sawridge First Nation;

   b. The Minister of Indian Affairs and Northern Development; and

c. Aline Elizabeth Huzar, June Martha Kolosky and Maurice Stoney.

8. The Interested Parties are not directly affected by the issues raised in the within appeal.

Background

9. The background facts relating to the 1985 Trust are not in dispute. They are set out in the affidavits of Paul Bujold dated August 30, September 12 and September 30, 2011. A detailed summary of the facts is contained as Schedule "A".

10. The 1985 Trust was settled on April 15, 1985. The trust assets consist of land, hotels and other business assets acquired by the Sawridge First Nation beginning in the early 1970's. The approximate value of the net assets of the 1985 Trust as at December 31, 2010 was $70,263,960.

Affidavit of Paul Bujold dated September 12, 2011, paras. 1, 8, 16 and 27, Extracts of Key Evidence of the Appellants, pages A0009 - A0011, A0013 and A0015.

11. The 1985 Trust was settled just prior to the coming into force of *Bill C-31*, legislation introduced by the federal government to address concerns that certain provisions of the 1970 *Indian Act* were discriminatory. Particular concern existed in respect of Indian women who lost their Indian status, and consequently their membership in a Band, upon marriage to a non-Indian.

Affidavit of Paul Bujold dated September 12, 2011, paras. 17 – 20, Extracts of Key Evidence of the Appellants, pages A0013 – A0014.

12. The 1985 Trust defined "Beneficiaries" to mean all persons who qualified as a member of the Sawridge First Nation pursuant to the provisions of the *Indian Act* as they existed on April 15, 1982. This effectively "froze" the definition of beneficiaries according to the legislation as it existed prior to *Bill C-31*.

Affidavit of Paul Bujold dated September 12, 2011, paras. 17 and 18, Extracts of Key Evidence of the Appellants, page A0013.

13. The Trustees have determined that maintaining the definition of "Beneficiaries" contained in the 1985 Trust is potentially discriminatory. The definition of "Beneficiaries" in the 1985 Trust would allow non-members of the First Nation to be beneficiaries of the 1985 Trust and would exclude certain members of the First Nation (such as those individuals acquiring membership as a result of *Bill C-31*) from being beneficiaries.

> Affidavit of Paul Bujold dated September 12, 2011, at para. 32, Extracts of Key Evidence of the Appellants, page A0016.

14. The Trustees believe that it is fair, equitable and in keeping with the history and purpose of the Trusts that the definition of "Beneficiaries" contained in the 1985 Trust be amended such that a beneficiary is defined as a member of the Nation, including those individuals acquiring membership as a result of *Bill C-31*. However, they recognize that there may be other alternatives in addressing this issue, and accordingly the Appellants initiated proceedings in the Court of Queen's Bench of Alberta to obtain the advice and direction of the Court (the "Advice and Direction Application").

> Affidavit of Paul Bujold dated September 12, 2011, at para. 33, Extracts of Key Evidence of the Appellants, page A0016.

15. The Appellants obtained an *ex parte* procedural Order on August 31, 2011 (the "Procedural Order"). The Procedural Order provided that notice of the Advice and Direction Application be given to, *inter alia*, the beneficiaries and potential beneficiaries of the 1985 Trust.

16. The Advice and Direction Application has yet to be heard. After receiving notice of the Advice and Direction Application, the Respondent brought their own application seeking:

    a. The appointment of the Public Trustee as litigation representative of minors who may be interested in the within proceedings; and

    b. The payment of advance costs on a solicitor and his own client basis and exemption from liability for costs as a condition of any such appointment.

17. By Order pronounced on June 12, 2012 (the "Order"), the Chambers Judge granted the Respondent's application. The Appellants appeal paragraphs 2, 3 and 5 of the Order, relating to costs.

[Appeal Record Digest, F89]

II. GROUNDS OF APPEAL

18. The Appellants appeal the Order on the following grounds:

a. The Chambers Judge erred in awarding the Respondent advance costs on a solicitor and its own client basis by concluding that the strict criteria set by the Supreme Court of Canada for the awarding of advance costs does not apply in these proceedings.

b. In the alternative, the Chambers Judge erred in awarding advance costs without any restriction or guidelines with respect to the amount of costs or the reasonableness of the same.

c. The Chambers Judge erred in exempting the Respondent of any responsibility to pay costs of the other parties in the proceeding.

d. The Chambers Judge erred in granting the Respondent costs of the application on a solicitor and its own client basis.

III. POINTS OF LAW

(a) Failure to Apply Strict Criteria for an Award of Advance Costs

(i) Standard of Review

19. The award of advance costs on a solicitor and his own client basis is an exercise of discretion. However, whether the Chambers Judge failed to consider or properly apply the applicable legal principle or test in exercising his discretion is a question of law, and the standard of review is correctness.

Dreco Energy Services Ltd. V. Wenzel, 2008 ABCA 290, at paras. 8 – 11. **(Tab 1)**

British Columbia (Minister of Forests) v. Okanagan Indian Band [2003] 3 S.C.R. 371, 2003 SCC 71 at para. 43. **(Tab 2)**

Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 8. **(Tab 3)**

20. Specifically, the applicability of the test for advance costs is a question of law, and the standard of review is correctness.

Deans v. Thachuk 2005 ABCA 368, at para. 16. **(Tab 4)**

21. In making an order as exceptional as one awarding advance costs, a motions judge must stay within the boundaries set out by the Supreme Court of Canada in respect of this issue.

Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue), 2007 SCC 2 at paras. 49 – 50. **(Tab 5)**

(ii) The Decision Below

22. In awarding advance costs, the Chambers Judge concluded:

> **39** Advance costs on a solicitor and own client basis are appropriate in this instance, as well as immunization against costs of other parties. The Little Sisters criteria are intended for advance costs by a litigant with an independent interest in a proceeding. Operationally, the role of the Public Trustee in this litigation is as a neutral 'agent' or 'officer' of the court. The Public Trustee will hold that position only by appointment by this Court. In these circumstances, the Public Trustee operates in a manner similar to a court appointed receiver, as described by Dickson J.A. (as he then was) in Braid Builders Supply & Fuel Ltd. v. Genevieve Mortgage Corp. Ltd. (1972), 29 D.L.R. (3d) 373, 17 C.B.R. (N.S.) 305 (Man. C.A.):
>
> > In the performance of his duties the receiver is subject to the order and direction of the Court, not the parties. The parties do not control his acts nor his expenditures and cannot therefore in justice be accountable for his fees or for the reimbursement of his expenditures. It follows that the receiver's remuneration must come out of the assets under the control of the Court and not from the pocket of those who sought his appointment.

> In this case, the property of the Sawridge Trust is the equivalent of the "assets under control of the Court" in an insolvency. Trustees in bankruptcy operate in a similar way and are generally indemnified for their reasonable costs: Residential Warranty Co. of Canada Inc. (Re), 2006 ABQB 236, 393 A.R. 340, affirmed 2006 ABCA 293, 275 D.L.R. (4th) 489 .
>
> [Appeal Record Digest, F78 – F79]

(iii) Appellants' Submissions

23. The leading case in Canada concerning a request for costs prior to the final disposition of a case and in any event of the cause is the Supreme Court of Canada's decision in *British Columbia (Minister of Forests) v. Okanagan Indian Band.*

> *British Columbia (Minister of Forests) v. Okanagan Indian Band* [2003] 3 S.C.R. 371, 2003 SCC 71. **(Tab 2)**

24. In *Okanagan Indian Band*, a three-part test was established for an award of advance costs. The party seeking the order must be impecunious, it must establish a *prima facie* meritorious case and there must be "special circumstances to satisfy the Court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate."

> *Okanagan Indian Band, supra*, at para. 36. **(Tab 2)**

25. This three-part test was confirmed by the Supreme Court in the decision of *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue),* 2007 SCC 2, and in the recent decision of *R. v. Caron*, 2011 SCC 5.

> *Little Sisters, supra* at para. 37. **(Tab 5)**
>
> *R. v. Caron*, 2011 SCC 5 at para. 39. **(Tab 6)**

26. In *Little Sisters*, the Supreme Court summarized and supplemented the three-part test as follows:

> The nature of the *Okanagan* approach should be apparent from the analysis it prescribes for advance costs in public interest cases. A litigant must convince the court that three absolute requirements are met (at para. 40):

> 1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial -- in short, the litigation would be unable to proceed if the order were not made.
>
> 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
>
> 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.
>
> In analysing these requirements, the court must decide, with a view to all the circumstances, whether the case is sufficiently special that it would be contrary to the interests of justice to deny the advance costs application, or whether it should consider other methods to facilitate the hearing of the case. The discretion enjoyed by the court affords it an opportunity to consider all relevant factors that arise on the facts.
>
> *Little Sisters*, *supra* at para. 37. **(Tab 5)**

27. In *Okanagan*, the Supreme Court of Canada made it clear that advance costs awards must be governed by the three-part test:

> **41** These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively.
>
> (emphasis added)
>
> *Okanagan, supra* at para. 41. **(Tab 2)**

28. In *Little Sisters*, the Supreme Court of Canada wrote the following:

> **38** It is only a "rare and exceptional" case that is special enough to warrant an advance costs award: *Okanagan*, at para. 1. The standard was indeed intended to be a high one, and although no rigid test can be applied systematically to determine whether a case is "special enough", some observations can be made. As Thackray J.A. pointed out, it was in failing to verify whether the circumstances of this case were "exceptional" enough that the trial judge committed an error in law.
>
> (emphasis added).

Little Sisters, supra, at para. 38. **(Tab 5)**

29. With respect to the first test relating to impecuniosity, Orkin notes that the test must be "strictly applied, and an applicant must meet a high standard of proof in order to demonstrate impecuniosity".

The Law of Costs, Toronto: Thomson Retuters, 2011 (looseleaf)) at p. 2-54, §203. **(Tab 7)**

30. There is no evidence before the Court to suggest that the Public Trustee is impecunious. The Chambers Judge noted at paragraph 35 of his decision that the "Public Trustee says that it has no budget for the costs of this type of proceedings". There was no evidence before the Chambers Judge to this effect, but rather counsel for the Respondent made that submission in written argument. To the extent that this was relied on by the Chambers Judge this is an error in law.

[Appeal Record Digest, F28, lines 31 – 39; F78]

31. In the second branch of the *Little Sisters* test, there must be some risk that the litigation will not proceed. In the case at hand, the opposite is true. The Advice and Direction Application will proceed regardless of the Respondent's involvement.

32. Further, with respect to the second part of the test, a case is meritorious if "the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means". Again, the Advice and Direction Application will proceed, the position of the children for whom the

Public Trustee was appointed will be presented by the Trustees, and the Court will deal with the application on its merits.

33. With respect to the third branch of the test, the issues raised in the Advice and Direction Application do not transcend the applicant, but rather are very specific to the 1985 Trust. Further, the issues deal with a relatively small group of people. There are no "special circumstances" in the case at hand.

Dish Network L.L.C. v. Rex, 2011 BCSC 1105, at paras. 68-69. **(Tab 8)**

34. Of course, the Chambers Judge failed to verify whether the circumstances of this case were special enough to warrant an advance costs award as he ignored the three-part test altogether.

35. The Chambers Judge concluded that the *Little Sisters* criteria was intended for advance costs by a litigant with an independent interest in the proceedings, and that the Respondent in the within proceedings was not such a litigant. The Chambers Judge concluded:

a. Operationally, the role of the Respondent in the litigation was as a neutral agent or officer of the Court.

b. In the circumstances, the Respondent operated in a manner similar to a Court appointed receiver or a trustee in bankruptcy.

c. The property of the 1985 Trust was equivalent to the "assets under control of the Court" in an insolvency, and as such that property should be used to indemnify the Respondent for their costs.

[Appeal Record Digest, F78 – F79]

36. It is respectfully submitted that the Chambers Judge erred in these conclusions.

37. The Respondent is tasked with the representation of a group of minors who may have a beneficial interest in the 1985 Trust. Its duty is to that group of individuals.

38. The role of a receiver is well-established in law and is dissimilar in many ways to the role of the Respondent in the within matter. A receiver is defined in the leading text on

receivers, *Bennett on Receiverships* (3rd ed.) (Toronto: Thompson Reuters Canada Limited, 2011) ("*Bennett*"), as the following at p. 1:

> The term "receiver" is used to describe a person who has been appointed by the court or a security holder under a security instrument to take possession and control of the property belonging to another ... In a court appointment, one purpose of a receiver is to preserve and protect the property on an interim basis pending resolution of the issues between the parties.
>
> *Bennett on Receiverships* (3rd ed.) (Toronto: Thompson Reuters Canada Limited, 2011) at p. 1. **(Tab 9)**

39. A receiver is restricted in seeking funds from trust assets as a general rule. As Bennett writes at p. 584:

> With respect to trust assets, the court-appointed receiver, like a trustee in bankruptcy, is generally not entitled to remuneration from the trust assets.
>
> *Bennett on Receiverships, supra,* at p. 584. **(Tab 9)**

40. A receiver does not take a position in the proceedings, but is merely a court-appointed official who manages assets and attempts to find a way to have as many creditors paid as possible:

> As the receiver is court-appointed, the receiver is agent of neither the security holder nor the debtor. The receiver is an officer of the court, appointed by the court and accountable to the court which made the appointment as well as accountable to and owing fiduciary duties to all interested parties, including the debtor.
>
> Once appointed by the court, the receiver should not take the position of the security holder who initiated the appointment but should act impartially and even-handedly to all interested parties.
>
> *Bennett on Receiverships* (3rd ed.) (Toronto: Thompson Reuters Canada Limited, 2011) at p. 212 – 213. **(Tab 9)**

41. The Chambers Judge also concluded that "the property of the Sawridge Trust is the equivalent of the 'assets under control of the Court' in an insolvency".

42. It is submitted that the 1985 Trust assets are neither under the control of the Court, nor like funds in an insolvency. The trust assets are under the control and legal ownership of

the Trustees, and the assets are beneficially owned by the beneficiaries. The Court does not "control" the assets as it might in the case of a receivership.

43. Further, the Respondent has not been tasked by the Court to manage the assets under dispute. The Appellants remain in possession and control of the trust assets and the Respondent has no right or ability to intervene. In contrast, a receiver is typically empowered to take possession of all of the debtor's property, with very few limitations on the ability to manage the property once in possession, including the ability to sell all of the assets under its control.

44. In sum, the Public Trustee is not at all like a receiver. The Public Trustee has been appointed to act on behalf of a group of interested parties and to take a position on their behalf, and owes no duties to any of the other beneficiaries or potential beneficiaries of the 1985 Trust.

45. The trust assets remain in the possession and control of the Appellants, and are not under the control of the Court. Generally, the Court is limited in its ability to affect the state of private funds being held in private hands.

46. In *Deans v. Thachuk, supra*, the Alberta Court of Appeal addressed the argument that the three-part test for advance costs had no application to pension trust litigation cases. The applicant argued that costs in such cases should be determined by different principles and that they are ordinarily granted on a solicitor-and-client basis, payable from the trust fund regardless of the outcome of the case.

Deans, supra, at paras. 17 – 20. **(Tab 4)**

47. This argument was rejected. Citing the majority's decision of LeBel, J in *Okanagan, supra*, the Court concluded:

> The three part test he prescribed established the parameters within which a court's discretion to award interim costs should be exercised. Nothing in his reasons suggests the test was not intended to apply in the context of pension trust litigation.

Deans, supra, at para. 21. **(Tab 4)**

48. The Court in *Deans* referred to the case of *Dominion Bridge Inc. (Trustee of) v. All Current & Former Plan Members of the Retirement Income Plan of Dominion Bridge Inc. – Manitoba*, and specifically paragraph 24 thereof.

49. *Dominion Bridge Inc.* was a case where a Trustee in Bankruptcy applied to the Court for payment of surplus funds of a pension plan on winding up of the corporation. A representative of the current and past members of the plan was appointed by the Court, and that representative brought an application for an award of interim costs. The representative argued that the three-part test enunciated in *Okanagan* did not apply to an interim cost award on an application for payment of surplus monies out of a pension plan. The Manitoba Court of Appeal rejected this argument. Chief Justice Scott, writing for the Court, stated:

> **24** In my opinion, it cannot be doubted that the decision of the Supreme Court in *Okanagan* and the three principles enunciated therein are intended to apply to all applications for interim or prospective costs, whatever the nature of the cause of action. Having said this, each case will in the end depend very much on its own unique circumstances. The facts before the motions court judge did not justify the order that he made.
>
> (emphasis added)

Dominion Bridge Inc. (Trustee of) v. All Current & Former Plan Members of the Retirement Income Plan of Dominion Bridge Inc. – Manitoba, 2004 MBCA 180 at para. 24. **(Tab 10)**

50. The Supreme Court of Canada has recently held that the *Little Sisters* test is broadly applicable in disparate contexts. In *R. v. Caron*, it was held to apply to an advance costs application in the context of a criminal prosecution raising the issue of constitutionally protected language rights.

R. v. Caron, supra, at paras. 36 – 39. **(Tab 6)**

51. We are not aware of any other case in Canada where the court has ignored the *Little Sisters* criteria and awarded advance costs to a publically funded body such as the Public Trustee in similar circumstances. Counsel for the Respondent was also unaware of any precedent for such an award.

[Appeal Record Digest, F57, lines 21 - 34]

52. It is respectfully submitted that the *Little Sisters* test for advance costs applies and the Chambers Judge has erred in law in failing to apply it. Had the proper test been applied, the application for advance costs would have been dismissed.

(b) Award of Advance Costs without any Restriction or Guidelines

(i) Standard of Review

53. The award of advance costs without restrictions is an exercise of discretion. However, whether the Chambers Judge failed to consider or properly apply the applicable legal principle or test in exercising his discretion is a question of law, and the standard of review is correctness.

Dreco Energy Services Ltd. V. Wenzel, 2008 ABCA 290, at paras. 8 – 11. **(Tab 1)**

(ii) The Decision Below

54. The Chambers Judge awarded the Respondent full and advance indemnification for its costs without any direction regarding accountability, reasonableness or ability to have the Respondent's accounts reviewed in any way.

55. The Respondent has free rein, contrary to the direction of the Supreme Court of Canada in that regard.

(iii) Appellants' Submissions

56. As noted above, the Appellants submit that the Chambers Judge has erred in law by ignoring the *Little Sisters* criteria and awarding full and advance costs to the Respondent.

57. In the alternative, if advance costs are warranted, the Appellants submit that the failure to impose restrictions or guidelines to the payment of costs constitutes an error of law.

58. The Supreme Court of Canada addressed the need for guidelines in *Little Sisters*:

> **42** Finally, the granting of an advance costs order does not mean that the litigant has free rein. On the contrary, when the public purse -- or another private party -- takes on the burden of an advance costs award, the litigant must relinquish some manner of control over how the litigation proceeds. The litigant cannot spend the opposing party's money without scrutiny. The benefit of such funding does not imply that a party can, at will, multiply hours of preparation, add expert witnesses, engage in every available proceeding, or lodge every conceivable argument. A definite structure must be imposed or approved by the court itself, as it alone bears the responsibility for ensuring that the award is workable.
>
> **43** For example, the court should set limits on the chargeable rates and hours of legal work, closely monitor the parties' adherence to its dictates, and cap the advance costs award at an appropriate global amount. It should also be sensitive to the reality that work often expands to fit the available resources and that the "maximum" amounts contemplated by a court will almost certainly be reached. As well, the possibility of setting the advance costs award off against damages actually collected at the end of the trial should be contemplated. In determining the quantum of the award, the court should remain aware that the purpose of these orders is to restore some balance between litigants, not to create perfect equality between the parties. Legislated schemes like legal aid and other programs designed to assist various groups in taking legal action do not purport to create equality among litigants, and there is no justification for advance costs awards placing successful applicants in a more favourable position. An advance costs award is meant to provide a basic level of assistance necessary for the case to proceed.
>
> (emphasis added)

Little Sisters, supra, at paras. 42 – 43. **(Tab 5)**

59. The Alberta Court of Appeal addressed the issue recently in *R. v. Caron*, 2011 ABCA 385:

> **31** The court asked to fund should sign no blank cheque, should craft terms carefully, and be mindful of all options: ***Okanagan***, *supra*, para 41; ***Little Sisters v Commr of Nat Rev***, 2007 SCC 2, [2007] 1 S.C.R. 38, 356 N.R. 83 (paras 40-43, 94, 112); ***Caron***2011, para 47.

R. v. Caron, 2011 ABCA 385 at para. 31. **(Tab 11)**

60. Special measures may be ordered to ensure some control over the amounts spent.

Tsilhqot-in Nation v. British Columbia, (2004), 240 D.L.R. (4th) 547 (B.C.S.C.), at paras. 20 and 50. **(Tab 12)**

61. Even a receiver must have its accounts passed and be accountable for the actions it has taken pursuant to the court order appointing him or her, and the fees must be reasonable and fair.

Bennett on Receiverships, *supra*, at p. 591. **(Tab 9)**

62. The Chambers Judge has imposed no definite structure to the costs award, has placed no limits on chargeable rates and hours of legal work, has ordered no cap at an appropriate global amount and has put in place no process to monitor adherence to its dictates. In effect, a blank cheque has been given to the Respondent, and in doing so the Chambers Judge has erred in law.

(c) Exemption from Liability to Pay Costs

(i) Standard of Review

63. The decision to exempt the Respondent from liability to pay costs is an exercise of discretion. However, whether the Chambers Judge failed to consider or properly apply the applicable legal principle or test in exercising his discretion is a question of law, and the standard of review is correctness.

Dreco Energy Services Ltd. V. Wenzel, 2008 ABCA 290, at paras. 8 – 11. **(Tab 1)**

(ii) The Decision Below

64. The Chambers Judge dealt with this issue in a single sentence in his decision:

> **39** Advance costs on a solicitor and own client basis are appropriate in this instance, as well as immunization against costs of other parties…
>
> [Appeal Record Digest, F78]

65. The matter is not addressed by the Chambers Judge in his decision any further.

(iii) Appellants' Submissions

66. The Chambers Judge addressed the issue of exemption for costs alongside his assessment of the issue of advance costs. It would appear that the basis of his decision was that upon finding that advance costs were warranted, an exemption from liability for costs necessarily followed.

67. As noted above, it is submitted that the Chambers Judge erred in law in not applying the *Little Sisters* criteria when assessing the issue of advance costs. Assuming that the Chambers Judge awarded an exemption from costs as a necessary corollary to his advance cost ruling, then to the extent that the Chambers Judge erred in law in not applying the *Little Sisters* criteria, his decision regarding exemption of costs must also be in error.

68. The recent case of *Farlow v. Hospital for Sick Children* [2009] O.J. No. 4847 (Ont. S.C.) addressed the issue at hand. After confirming that no Ontario cases had been put before the court in which a party was immunized from a cost award prior to trial, Justice Herman referred to the *Little Sisters* decision. There, in addressing different kinds of cost mechanisms, including "adverse costs immunity", Bastarache and LeBel JJ. noted that a "creative cost award" is an exceptional one, to be granted in special circumstances.

> *Farlow v. Hospital for Sick Children* [2009] O.J. No. 4847 (Ont. S.C.) at para. 90. **(Tab 13)**

69. Justice Herman concluded:

> **94** The first proposition is that the granting of a costs immunity award is exceptional. The fact that I was not referred to any Ontario case in which it has been awarded, is testament to this proposition.
>
> **95** Other factors that may be taken into account include: whether the applicant's financial circumstances are such that the applicant would probably not proceed absent such an order; the extent to which the public has an interest in the issues being litigated; and the potential impact of such an award on the other parties.
>
> **96** A costs immunity order raises the risk that the party that has been immunized from a costs order may fail to be accountable for the time and money expended on the case. However, this risk could be addressed by requiring that the

litigant relinquish some control over the litigation process, as was proposed in the *Little Sisters* case.

Farlow v. Hospital for Sick Children [2009] O.J. No. 4847 (Ont. S.C.) at paras. 94 – 96. **(Tab 13)**

70. Justice Herman effectively incorporated the three-part test in *Little Sisters* into his analysis. That test requires the applicant to show that it is impecunious, that it has a *prima facie* meritorious case and that the issues raised transcend the individual interests of the particular litigant and are of public importance.

Little Sisters, supra, at para. 37. **(Tab 5)**

71. As noted above, the Respondent has failed on all three branches of the test.

72. Advance costs should be limited to rare and exceptional cases. The same applies to an award for an exemption from costs. The Supreme Court of Canada in *Little Sisters* commented as follows:

> **34** Nevertheless, the general rule based on principles of indemnity, i.e., that costs follow the cause, has not been displaced. This suggests that policy and indemnity rationales can co-exist as principles underlying appropriate costs awards, even if "[t]he principle that a successful party is entitled to his or her costs is of long standing, and should not be departed from except for very good reasons": Orkin, at p. 2-39.
>
> .....
>
> **38** It is only a "rare and exceptional" case that is special enough to warrant an advance costs award: *Okanagan*, at para. 1. The standard was indeed intended to be a high one…

Little Sisters, supra at paras. 34 and 38. **(Tab 5)**

73. It is submitted that the Chambers Judge provided no reasons for his award for immunity from costs. We submit that there is no evidence to support such an award and thus the Chambers Judge has erred in exempting the Respondents from costs of the other parties.

(d) Costs of the Application on a Solicitor and its own Client Basis

(i) Standard of Review

74. The decision to award costs of the application on a solicitor and its own client basis is an exercise of discretion. However, whether the Chambers Judge failed to consider or properly apply the applicable legal principle or test in exercising his discretion is a question of law, and the standard of review is correctness.

Half Moon Lake Resort Ltd. v. Strathcona (County), 2001 ABCA 50 at para. 47. **(Tab 14)**

Dreco Energy Services Ltd. V. Wenzel, 2008 ABCA 290, at paras. 8 – 11. **(Tab 1)**

(ii) The Decision Below

75. The Chambers Judge dealt with this issue in a single sentence in his decision:

> **56** The application of the Public Trustee is granted with all costs of this application to be calculated on a solicitor and its own client basis.
>
> [Appeal Record Digest, F83]

76. There were no reasons given for the award of costs.

(iii) Appellants' Submissions

77. It is only in rare and exceptional circumstances that costs will be awarded on a solicitor and client basis.

Jackson v. Trimac Industries Ltd., 1993 CanLII 7031 (AB QB) at para. 12. **(Tab 15)**

Half Moon Lake Resort Ltd. v. Strathcona (County), 2001 ABCA 50 at para. 48. **(Tab 14)**

78. Solicitor and client costs are generally awarded only where there has been "reprehensible, scandalous or outrageous conduct" on the part of one of the parties.

Young v. Young, (1993) 108 D.L.R. (4th) 193 (S.C.C.) at para. 251. **(Tab 16)**

Strategy Summit Ltd. v. Remington Development Corp., 2012 ABQB 61 at paras. 12 – 13. **(Tab 17)**

79. While solicitor and client costs should only be awarded in rare and exceptional cases, much more care and concern must be exercised before awarding "solicitor and his own client" costs.

Max Sonnenberg Inc. v Stewart, Smith (Canada) Ltd., 1986 CanLII 1771 (AB QB) at para. 20. **(Tab 18)**

80. Solicitor and his own client costs were found to be appropriate where forgery was proved and the Court concluded that the conduct of the party was "as extreme in civil law as it can be before other authorities of the state take interest".

Chrystian v. Topilko, 2010 ABQB 456 at para. 58. **(Tab 19)**

81. Where the misconduct of the party did not amount to fraud, solicitor and his own client costs was refused and instead solicitor-client costs were awarded.

Koerner v. Capital Health Authority, 2011 ABQB 191 at para. 67. **(Tab 20)**

82. The Chambers Judge failed to consider the proper legal principles in making the costs award. In addition, there is no evidence upon which to base such an award and thus in making such an award committed an error in law.

83. Further, there is no suggestion that there has been any misconduct by the Appellants in the within proceedings that would warrant an award of costs on a solicitor and his own client basis. An award of costs on a solicitor and his own client basis should only occur in rare and exceptional circumstances. There was no improper conduct by the Appellants in having this issue determined by the Court, and in the circumstances costs on a solicitor and his own client basis are not warranted.

84. The awarding of costs of the application was done without notice to the Appellant and without submissions by the parties. If the basis of this award was the conclusion by the Chambers Judge that the Respondent was entitled to advance costs in these proceedings

on a solicitor and his own client basis, it is submitted that the Chambers Judge erred in law in not applying the *Little Sisters* criteria when assessing the issue of advance costs. It follows then that such an error would negate the award of costs of the application itself.

IV. NATURE OF RELIEF SOUGHT

85. The Appellants ask that the appeal be allowed with costs.

Estimated time of argument: 45 minutes.

ALL OF WHICH is respectfully submitted this 20 day of December, 2012.

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Counsel for the Appellants

Per: _____
Fred Kozak, Q.C.

Per: _____
Marco S. Poretti

Fraser Milner Casgrain LLP
Counsel for the Appellants

Per: _____
Doris Bonora

V. LIST OF AUTHORITIES

Tab

1. *Dreco Energy Services Ltd. V. Wenzel*, 2008 ABCA 290
2. *British Columbia (Minister of Forests) v. Okanagan Indian Band* [2003] 3 S.C.R. 371, 2003 SCC 71
3. *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235
4. *Deans v. Thachuk* 2005 ABCA 368
5. *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue),* 2007 SCC 2
6. *R. v. Caron*, 2011 SCC 5
7. *The Law of Costs*, Toronto: Thomson Retuters, 2011 (looseleaf))
8. *Dish Network L.L.C. v. Rex*, 2011 BCSC 1105
9. *Bennett on Receiverships* (3rd ed.) (Toronto: Thompson Reuters Canada Limited, 2011)
10. *Dominion Bridge Inc. (Trustee of) v. All Current & Former Plan Members of the Retirement Income Plan of Dominion Bridge Inc. – Manitoba,* 2004 MBCA 180
11. *R. v. Caron*, 2011 ABCA 385
12. *Tsilhqot-in Nation v. British Columbia*, (2004), 240 D.L.R. (4th) 547 (B.C.S.C.)
13. *Farlow v. Hospital for Sick Children* [2009] O.J. No. 4847 (Ont. S.C.)
14. *Half Moon Lake Resort Ltd. v. Strathcona (County),* 2001 ABCA 50
15. *Jackson v. Trimac Industries Ltd.,* 1993 CanLII 7031 (AB QB)
16. *Young v. Young*, (1993) 108 D.L.R. (4th) 193 (S.C.C.)
17. *Strategy Summit Ltd. v. Remington Development Corp.*, 2012 ABQB 61
18. *Max Sonnenberg Inc. v Stewart, Smith (Canada) Ltd.*, 1986 CanLII 1771 (AB QB)
19. *Chrystian v. Topilko*, 2010 ABQB 456
20. *Koerner v. Capital Health Authority*, 2011 ABQB 191

Summary of Facts Relating to the 1985 Trust

1. In 1966, Chief Walter Patrick Twinn ("Chief Walter Twinn") became the Chief of the Sawridge Band No. 454, now known as Sawridge First Nation (the "Sawridge First Nation" or the "Nation"), and remained the Chief until his death on October 30, 1997.

   Affidavit of Paul Bujold dated September 12, 2011, para. 6, Extracts of Key Evidence of the Appellants, page A0010.

2. In the early 1970's, the Sawridge First Nation began investing some of its oil and gas royalties in land, hotels and other business assets. At the time, it was unclear whether the Nation had statutory ownership powers, and accordingly assets acquired by the Nation were registered in the names of individuals who would hold the property in trust. By 1982, Chief Walter Twinn, George Twin, Walter Felix Twin, Samuel Gilbert Twin and David Fennell held a number of assets in trust for the Sawridge First Nation.

   Affidavit of Paul Bujold dated September 12, 2011, para. 8, Extracts of Key Evidence of the Appellants, page A0011.

3. In 1982, the Sawridge First Nation decided to establish a formal trust in respect of the property then held in trust by individuals. The establishment of the formal trust would enable the Nation to provide long term benefits to the members and their descendents. On April 15, 1982, a declaration of trust establishing the Sawridge Band Trust (the "1982 Trust") was executed. All property held by Chief Walter Twinn and the other individuals was transferred into the 1982 Trust.

   Affidavit of Paul Bujold dated September 12, 2011, paras. 9 - 12, Extracts of Key Evidence of the Appellants, pages A0011 - A0012.

4. On April 17, 1982, the *Constitution Act, 1982*, which included the *Canadian Charter of Rights and Freedoms* (hereinafter referred to as the "*Charter*") came into force. Section

15 of the *Charter* did not have effect, however, until April 17, 1985, to enable provincial and federal legislation to be brought into compliance.

5. After the Charter came into force, the federal government began the process of amending the *Indian Act*, R.S.C. 1970, c. I-6 (the "1970 *Indian Act*"). Following the federal election in 1984, the government introduced *Bill C-31* to address concerns that certain provisions of the 1970 Indian Act relating to membership were discriminatory.

6. It was expected that *Bill C-31* would result in an increase in the number of individuals included on the membership list of the Sawridge First Nation. This led the Nation to settle a new trust, the 1985 Trust, within which assets would be preserved for Nation members as defined by the legislation prior to *Bill C-31*.

> Affidavit of Paul Bujold dated September 12, 2011, para. 15, Extracts of Key Evidence of the Appellants, page A0013.

7. On April 15, 1985 the Sawridge Band Intervivos Settlement was created (the "1985 Trust").

> Affidavit of Paul Bujold dated September 12, 2011, paras. 1 and 16, Extracts of Key Evidence of the Appellants, pages A0009 and A0013.

8. The 1985 Trust provides that the "Beneficiaries" are:

> "Beneficiaries at any particular time shall mean all persons who at that time qualify as members of the Sawridge Indian Band No. 19 pursuant to the provisions of the Indian Act R.S.C. 1970, Chapter I-6 as such provisions existed on the 15th day of April, 1982 and, in the event that such provisions are amended after the date of the execution of this Deed all persons who at such particular time would qualify for membership of the Sawridge Indian Band No. 19 pursuant to the said provisions as such provisions existed on the 15th day of April 1982 and, for greater certainty, no persons who would not qualify as members of the Sawridge Indian Band No. 19 pursuant to the said provisions, as such provisions existed on the 15th day of April, 1982, shall be regarded as "Beneficiaries" for the purpose of this Settlement whether or not such persons become or are at any time considered to be members of the Sawridge Indian Band No. 19 for all or any other purposes by virtue of amendments to the Indian Act R.S.C. 1970, Chapter I-6 that may come into force at any time after the date of the execution of this Deed or by virtue of any other legislation enacted by the Parliament of Canada or by any province or by virtue of any regulation, Order in Council, treaty or executive act

of the Government of Canada or any province or by any other means whatsoever; provided, for greater certainty, that any person who shall become enfranchised, become a member of another Indian band or in any manner voluntarily cease to be a member of the Sawridge Indian Band No. 19 under the Indian Act R.S.C. 1970, Chapter I-6, as amended from time to time, or any consolidation thereof or successor legislation thereto shall thereupon cease to be a Beneficiary for all purposes of this Settlement."

Affidavit of Paul Bujold dated September 12, 2011, para. 17, Extracts of Key Evidence of the Appellants, page A0013.

9. The 1985 Trust effectively "froze" the definition of beneficiaries according to the legislation as it existed prior to *Bill C-31*.

Affidavit of Paul Bujold dated September 12, 2011, para. 18, Extracts of Key Evidence of the Appellants, page A0013.

10. By way of a resolution dated April 15, 1985, the trustees of the 1982 Trust resolved to transfer all of the assets of the 1982 Trust to the 1985 Trust. This transfer was carried out with the approval of the members of the Sawridge First Nation and under the guidance of lawyers and accountants.

Affidavit of Paul Bujold dated September 12, 2011, paras. 19 – 24, Extracts of Key Evidence of the Appellants, pages A0014 - A0015.

11. Taking into account the assets and liabilities of the 1985 Trust, the approximate value of the net assets of the 1985 Trust as at December 31, 2010 is $70,263,960.

Affidavit of Paul Bujold dated September 12, 2011, para. 27, Extracts of Key Evidence of the Appellants, page A0015.

12. On August 15, 1986, the Sawridge Band Trust was settled (the "1986 Trust"). The beneficiaries of the 1986 Trust included all members of the Sawridge First Nation in the post-*Bill C-31* era.

Affidavit of Paul Bujold dated September 12, 2011, para. 29, Extracts of Key Evidence of the Appellants, page A0015.

13. The Sawridge First Nation transferred cash and other assets into the 1986 Trust to further the purposes of the trust. After April 15, 1985 no further funds or assets were put into the 1985 Trust. Effectively, the assets in existence as at April 15, 1985 were preserved for those who qualified as Sawridge members based on the definition of membership that existed at that time. The 1986 Trust was established so that assets coming into existence subsequent to April 15, 1985 could be held in trust for those individuals who qualified as members in accordance with the definition of membership that existed in the post-*Bill C-31* era.

Affidavit of Paul Bujold dated September 12, 2011, paras. 30 – 31, Extracts of Key Evidence of the Appellants, page A0016.

14. *Bill C-31* gave Indian bands the option of taking over control of their membership list by establishing their own membership codes, subject to the approval of the Minister of Indian Affairs. The Sawridge First Nation established such a code, and took over control of its membership effective July 8, 1985. It continues to exercise this control to this day.

Affidavit of Elizabeth Poitras dated December 7, 2011, paras. 3, 5 and 15, Extracts of Key Evidence of the Appellants, pages A0119 - A0120.

Indian Act, R.S.C. 1985, c. I-5, s. 10. **(Tab 3)**

15. As at September 30, 2011, the Sawridge First Nation had 41 members, all of whom were older than 18 years of age. These members have 31 dependant children younger than 18 years of age (the "Minor Dependants"). Twenty-three of the Minor Dependants qualify as beneficiaries of the 1985 Trust (hereinafter referred to as the "1985 Minor Beneficiaries"), and there are no other beneficiaries of the 1985 Trust younger than 18 years of age. The other eight Minor Dependants do not qualify as beneficiaries of the 1985 Trust.

Affidavit of Paul Bujold dated September 30, 2011, paras. 3 and 4, Extracts of Key Evidence of the Appellants, page A0116.

16. The Trustees have determined that maintaining the definition of "Beneficiaries" contained in the 1985 Trust is potentially discriminatory. The definition of "Beneficiaries" in the 1985 Trust would allow non-members of the First Nation to be beneficiaries of the 1985 Trust and would exclude certain members of the First Nation (such as those individuals acquiring membership as a result of *Bill C-31*) from being beneficiaries.

Affidavit of Paul Bujold dated September 12, 2011, para. 32, Extracts of Key Evidence of the Appellants, page A0016.

17. The Trustees believe that it is fair, equitable and in keeping with the history and purpose of the Trusts that the definition of "Beneficiaries" contained in the 1985 Trust be amended such that a beneficiary is defined as a member of the Nation, including those individuals acquiring membership as a result of *Bill C-31.* However, they recognize that there may be other alternatives in addressing this issue, and accordingly have sought the advice and direction of the Court.

Affidavit of Paul Bujold dated September 12, 2011, para. 33, Extracts of Key Evidence of the Appellants, page A0016.

18. The Trustees have been administering the 1985 Trust and the 1986 Trust (the "Trusts") for many years. In December of 2008, the Trustees retained the Four Worlds Centre for Development Learning (hereinafter referred to as "Four Worlds") to conduct a consultation process with the beneficiaries of the Trusts. Four Worlds prepared a report identifying the types of programs and services that the Trusts should offer to the beneficiaries and the types of payments the Trustees should consider making from the Trusts. The programs identified include health, dental and long-term disability insurance, compassionate care support, seniors support, child and youth development and educational support.

Affidavit of Paul Bujold dated September 12, 2011, para. 34, Extracts of Key Evidence of the Appellants, pages A0016 - A0017.

19. These programs will be offered not only to the beneficiaries of the Trusts, but to the Minor Dependants as well, through their parents, regardless of their status as a beneficiary under the Trusts.

Affidavit of Paul Bujold dated September 12, 2011, para. 34, Extracts of Key Evidence of the Appellants, pages A0016 - A0017.

20. For example, the same programs, services and other benefits that will be offered to the 1985 Minor Beneficiaries will also be offered to the eight Minor Dependants who do not qualify as beneficiaries of the 1985 Trust. This is because the programs, services and other benefits are offered equally between the 1985 Trust and the 1986 Trust, and the eight Minor Dependants that do not qualify as beneficiaries under the 1985 Trust will nonetheless have these benefits offered to them because they are dependants of beneficiaries of the 1986 Trust.

Affidavit of Paul Bujold dated September 30, 2011, paras. 5 and 6, Extracts of Key Evidence of the Appellants, pages A0116 - A0117.

21. Minors whose parents are beneficiaries of the Trust may receive substantial support whether the minor is a member or not.

Affidavit of Paul Bujold dated September 30, 2011, paras. 5 and 6, Extracts of Key Evidence of the Appellants, pages A0116 - A0117.

22. Having undertaken the consultation process, the Trustees have a desire to confer more direct benefits on the beneficiaries of the Trusts. The Trustees require clarification of, and if necessary, amendment to the 1985 Trust prior to conferring these benefits.

Affidavit of Paul Bujold dated September 12, 2011, para. 35, Extracts of Key Evidence of the Appellants, page A0017.

23. In seeking the advice and direction of the Court, the Trustees have made great efforts to provide notice to anyone who may have any interest. The Trustees have placed advertisements in newspapers in Western Canada to try to ascertain potential

beneficiaries. The Trustees then notified, *inter alia,* all registered members of the Nation, all known beneficiaries of the 1985 Trust, all parents of minors who are beneficiaries, all individuals who have applied for membership in the Sawridge First Nation, all individuals responding to newspaper advertisements placed by the Trustees and any other individual who the Trustees had reason to believe would be potential beneficiaries of the 1985 Trust. The Public Trustee and the Minister of Aboriginal Affairs and Northern Development were also provided notice.

Affidavit of Paul Bujold dated August 30, 2011, paras. 7 – 11, Extracts of Key Evidence of the Appellants, pages A0002 - A0003.